A **MENTERI BESAR NEGERI PAHANG DARUL MAKMUR**

v.

SERUAN GEMILANG MAKMUR SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
SULAIMAN DAUD JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: C-01-95-09]
C 31 MARCH 2010

ADMINISTRATIVE LAW: *Judicial review - Remedies - Mandamus - Monetary judgment against government - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government*
D *Proceedings Act 1956 - Whether application for order of mandamus in breach of time frame prescribed in O. 53 r. 3(6) Rules of the High Court 1980 - Whether order of mandamus would lie against Chief Minister to enforce payment of judgment sum*

CIVIL PROCEDURE: *Government proceedings - Monetary judgment*
E *against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government Proceedings Act 1956 - Whether application for order of mandamus in breach of time frame prescribed in O. 53 r. 3(6) Rules of the High Court 1980 - Whether*
F *order of mandamus would lie against Chief Minister to enforce payment of judgment sum*

CIVIL PROCEDURE: *Judgment - Enforcement of judgment - Monetary judgment against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government*
G *Proceedings Act 1956 - Whether application for order of mandamus in breach of time frame prescribed in O. 53 r. 3(6) Rules of the High Court 1980 - Whether order of mandamus would lie against Chief Minister to enforce payment of judgment sum*

H ***CIVIL PROCEDURE:*** *Execution - Judgment - Monetary judgment against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government Proceedings Act 1956 - Whether application for order of mandamus in breach of time frame prescribed in O. 53 r. 3(6) Rules of the High Court 1980 - Whether*
I *order of mandamus would lie against Chief Minister to enforce payment of judgment sum*

CIVIL PROCEDURE: *Parties - Government, action against - Monetary judgment against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government Proceedings Act 1956 - Whether correct party cited in application for order of mandamus*

CIVIL PROCEDURE: *Time - When time to run from - Monetary judgment against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government Proceedings Act 1956 - Whether application for order of mandamus in breach of time frame prescribed in O. 53 r. 3(6) Rules of the High Court 1980*

CONSTITUTIONAL LAW: *Government - Proceedings against - Monetary judgment against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government Proceedings Act 1956 - Whether application for order of mandamus in breach of time frame prescribed in O. 53 r. 3(6) Rules of the High Court 1980 - Whether order of mandamus would lie against Chief Minister to enforce payment of judgment sum*

CONSTITUTIONAL LAW: *Executive - Chief Minister - Monetary judgment against government - Mandamus - Enforcement of payment of judgment sum by virtue of certificate issued under s. 33(1) Government Proceedings Act 1956 - Whether order of mandamus would lie against Chief Minister to enforce payment of judgment sum*

The respondent had obtained, after a full trial, a valid monetary judgment ('said judgment') against the State Government of Pahang and the Director of the Forestry Department of Pahang ('defendants'). Appeal against the said judgment was struck off by the Court of Appeal on 13 February 2008, and the application for leave to further appeal was dismissed by the Federal Court on 17 September 2008. But even before all avenues of appeal had closed, the respondent had proceeded to levy execution of the said judgment. On 7 March 2008, the respondent had obtained a certificate under s. 33(1) ('s. 33 certificate') of the Government Proceedings Act 1956 ('GPA') which it then served on the State Legal Advisor of Pahang on 7 April 2008. The next action that the respondent took to compel payment of the judgment sum was to issue a letter of demand dated 27 August 2008, which drew no response from the defendants. The respondent then, on 15 October 2008, filed an application for judicial review for an order of *mandamus* to enforce

A the said judgment against, not the defendants, but the appellant. The High Court allowed the application, resulting in the present appeal in which the following two issues were raised: (i) whether the application for the order of *mandamus* by the respondent was in breach of the time frame of 40 days prescribed in O. 53 r. 3(6) of
B the Rules of the High Court 1980 ('RHC'); and (ii) whether the order of *mandamus* would lie against the appellant to enforce payment of the judgment sum.

Held (allowing the appeal with costs)
C **Per Jeffrey Tan JCA:**

(1) The order of *mandamus* was issued to the wrong entity. Under art. 11(4) of the Constitution of Pahang ('State Constitution'), the State Financial Officer shall, subject to the provisions of this Part, be the principal officer in charge of the financial
D affairs of the State. Unlike the Minister in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* who was in charge of financial matters for the State and who was responsible for the payment of the judgment sum, the appellant was not the principal officer in charge of the financial affairs of the State of
E Pahang. The appellant was not responsible for the payment of the judgment sum. *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (dist). (para 57)

(2) The stated ground for the application for judicial review was
F failure on the defendants' part to comply with the s. 33 certificate. Insofar as the respondent was concerned, the State Government of Pahang had to pay the judgment sum upon service of the s. 33 certificate, without any question of deferment. Section 33(3) of the GPA was absolutely clear-cut
G that the respondent should be paid the amount appearing in the certificate together with the interest, unless there was a direction that payment be suspended. Given that there was no direction that payment was suspended, the duty to pay arose upon service of the s. 33 certificate, literally upon presentation
H thereof. On the facts, the grounds for the application first arose on 7 April 2008, when service of the s. 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a
I patent failure to comply with the rules of court, and the order of *mandamus* should have been there and then refused. (paras 62 & 63)

Per Sulaiman Daud JCA:

(1) The effect of the order against the appellant was to compel him to make the payment of the judgment sum pursuant to the s. 33 certificate. The order of *mandamus* was to compel the performance of a duty and not the exercise of a power. As such, the question here was not whether the appellant had the power to make or order the making of such payment but rather whether he had a duty or obligation to make such payment. Upon perusal of the provisions of the State Constitution and the Financial Procedure Act 1957, there was nothing therein which imposes such a duty or obligation upon the appellant. The duty to make payment in satisfaction of a judgment debt against the State relates to the financial affairs of the State, which lies in the hands of the State Financial Officer. Thus, the trial judge had erred in law in granting the order of *mandamus* against the appellant to compel him to pay the said judgment sum pursuant to the s. 33 certificate. (para 46)

Per Zaleha Zahari JCA:

(1) On the facts of this case, it was clear that the respondent only commenced enforcement proceedings by way of an application for judicial review after all appeals against the said judgment had been disposed of. The judicial review application for *mandamus* resorted to by the respondent was to overcome the problem when confronted with the defendants' recalcitrance to pay the said judgment. Clearly, in the present circumstances, the fact that the respondent took such an action after all appeals had been disposed of should not be held against it. In filing the application within 40 days of the Federal Court's decision on 17 September 2008, the respondent had acted "promptly" and in compliance with O. 53 r. 3(6) of the RHC. (para 25)

(2) Under the State Constitution, the responsibility for the financial affairs of the State of Pahang is conferred on the State Financial Officer and the respondent's reliance on *Petrojasa (supra)* as authority for the proposition that the State Financial Officer cannot be cited as a party to enforce a judgment against the State Government was misplaced. There is no such legal impediment. It is to be noted that in *Petrojasa (supra)*, the "Minister of Finance, Government of Sabah", not the "Chief

A Minister, Government of Sabah", was cited as a party based on arts. 6(1), (2) and 9(1) of the Constitution of the State of Sabah. The judge should have dismissed the application as the proper party had not been cited in the judicial review application. On this ground, the appeal ought to be allowed.
B *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (dist). (paras 30 & 31)

Bahasa Malaysia *Translation Of Headnotes*

C Responden telah memperolehi, selepas suatu perbicaraan penuh, suatu penghakiman kewangan ('penghakiman tersebut') terhadap Kerajaan Negeri Pahang dan Pengarah Jabatan Perhutanan Pahang ('defendan-defendan'). Rayuan terhadap penghakiman tersebut telah dibatalkan oleh Mahkamah Rayuan pada 13 Februari 2008, dan
D permohonan kebenaran untuk rayuan lanjutan telah ditolak oleh Mahkamah Persekutuan pada 17 September 2008. Tetapi sebelum semua jalan rayuan telah ditutup, responden telah terus mengenakan pelaksanaan penghakiman tersebut. Pada 7 Mac 2008, responden telah memperolehi suatu sijil di bawah s. 33(1) ('sijil s. 33') Akta
E Prosiding Kerajaan 1956 ('APK') yang ia kemudiannya sampaikan ke atas Penasihat Undang-undang Negeri Pahang pada 7 April 2008. Tindakan seterusnya yang diambil oleh responden untuk mendesak bayaran jumlah penghakiman ialah untuk mengeluarkan suatu surat tuntutan bertarikh 27 Ogos 2008, yang tidak mendapat apa-apa
F respons daripada defendan-defendan. Responden kemudiannya, pada 15 Oktober 2008, memfailkan permohonan untuk semakan kehakiman bagi suatu perintah *mandamus* untuk menguatkuasakan penghakiman tersebut terhadap, bukan defendan-defendan, tetapi perayu. Mahkamah Tinggi membenarkan permohonan tersebut,
G mengakibatkan rayuan semasa di mana kedua isu-isu berikut telah timbul: (i) sama ada permohonan untuk perintah *mandamus* oleh responden telah melanggar jangka masa 40 hari yang diperuntukkan dalam A. 53 k. 3(6) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) sama ada perintah *mandamus* boleh digunakan
H terhadap perayu untuk menguatkuasakan pembayaran jumlah penghakiman.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Jeffrey Tan HMR:

I **(1)** Perintah *mandamus* telah dikeluarkan kepada entiti yang salah. Di bawah Perkara 11(4) Perlembagaan Pahang ('Perlembagaan Negeri'), Pegawai Kewangan Negeri seharusnya, tertakluk kepada

peruntukan-peruntukan Bahagian ini, menjadi pegawai utama yang bertanggungjawab tentang hal-hal kewangan Negeri. Tidak seperti Menteri dalam *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* yang bertanggungjawab tentang perkara-perkara kewangan Negeri dan juga bayaran jumlah penghakiman, perayu bukan pegawai utama yang bertanggungjawab tentang hal-hal kewangan Negeri Pahang. Perayu tidak bertanggungjawab bagi bayaran jumlah penghakiman tersebut. *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (dibezakan).

(2) Alasan yang dinyatakan bagi permohonan untuk semakan kehakiman ialah kegagalan atas pihak defendan-defendan untuk mematuhi sijil s. 33. Bagi responden, Kerajaan Negeri Pahang mesti membayar jumlah penghakiman selepas penyampaian sijil s. 33, tanpa apa-apa soalan penangguhan. Seksyen 33(3) APK adalah sangat jelas bahawa responden mesti dibayar amaun dalam sijil bersama dengan bunga, kecuali terdapat arahan bahawa bayaran digantung. Oleh kerana tiada arahan bahawa bayaran telah digantung, kewajipan untuk membayar timbul apabila sijil s. 33 disampaikan, secara literal apabila ia dipersembahkan. Berdasarkan fakta-fakta, alasan-alasan permohonan timbul pertamanya pada 7 April 2008, apabila penyampaian sijil s. 33 tidak mengakibatkan bayaran. Difailkan lebih dari enam bulan kemudian pada 15 Oktober 2008 tanpa apa-apa pelanjutan 40 hari tersebut, permohonan untuk semakan kehakiman nyata melebihi masa. Terdapat kegagalan yang jelas untuk mematuhi kaedah-kaedah mahkamah, dan perintah *mandamus* sepatutnya ditolak pada ketika itu juga.

Oleh Sulaiman Daud HMR:

(1) Kesan perintah itu terhadap perayu adalah untuk mendesaknya untuk membuat bayaran jumlah penghakiman mengikut sijil s. 33. Perintah *mandamus* ialah untuk memaksi pelaksanaan suatu kewajipan dan bukan pelaksanaan suatu kuasa. Oleh itu, soalan di sini bukan sama ada perayu mempunyai kuasa untuk membuat atau mengarahkan pembuatan bayaran sebegitu tetapi sama ada beliau mempunyai kewajipan atau obligasi untuk membuat bayaran sebegitu. Setelah membaca peruntukan-peruntukan Perlembagaan Negeri atau Akta Prosedur Kewangan 1957, tidak ada apa-apa di dalamnya yang mengenakan kewajipan atau obligasi sedemikian ke atas perayu. Kewajipan untuk membuat bayaran untuk menyelesaikan suatu hutang

penghakiman terhadap Negeri berhubung dengan hal-hal kewangan Negeri, yang terletak dalam tangan Pegawai Kewangan Negeri. Oleh yang demikian, hakim perbicaraan telah khilaf dalam undang-undang dengan membenarkan perintah *mandamus* terhadap perayu untuk memaksanya membayar jumlah penghakiman tersebut menurut sijil s. 33.

Oleh Zaleha Zahari HMR:

(1) Berdasarkan fakta-fakta kes ini, ia adalah jelas bahawa responden hanya memulakan prosiding penguatkuasaan melalui permohonan untuk semakan kehakiman selepas semua rayuan-rayuan terhadap penghakiman tersebut telah diselesaikan. Permohonan semakan kehakiman bagi *mandamus* yang digunakan oleh responden ialah untuk mengatasi kesusahan apabila dihadapkan dengan kedegilan defendan-defendan untuk membayar penghakiman tersebut. Jelasnya, dalam keadaan-keadaan semasa, fakta bahawa responden telah mengambil tindakan sedemikian setelah semua rayuan-rayuan telah diselesaikan tidak seharusnya diambil kira menentangnya. Dengan memfailkan permohonan dalam masa 40 hari dari keputusan Mahkamah Persekutuan pada 17 September 2008, responden telah bertindak dengan "cepat" dan telah mematuhi A. 53 k. 3(6) KMT.

(2) Di bawah Perlembagaan Negeri, kewajipan bagi hal-hal kewangan Negeri Pahang dianugerahkan ke atas Pegawai Kewangan Negeri dan pergantungan responden atas *Petrojasa (supra)* sebagai otoriti bagi proposisi bahawa Pegawai Kewangan Negeri tidak boleh disebut sebagai pihak untuk menguatkuasakan sesuatu penghakiman terhadap Kerajaan Negeri disalahletak. Tidak ada apa-apa halangan undang-undang sebegitu. Ia harus diperhatikan bahawa dalam *Petrojasa (supra)*, "Menteri Kewangan, Kerajaan Sabah", bukan "Menteri Besar, Kerajaan Sabah", telah disebutkan sebagai sesuatu pihak berasaskan Perkara-perkara 6(1), (2) dan 9(1) Perlembagaan Negeri Sabah. Hakim sepatutnya menolak permohonan kerana pihak betul tidak disebutkan dalam permohonan semakan kehakiman. Berdasarkan alasan ini, rayuan sepatutnya dibenarkan. *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (dibezakan).

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 6 CLJ 473 CA ***(refd)***

Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors [1999] 8 CLJ 37 HC ***(refd)***

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Cheah Wong Nyan And Cheah Sin Kee v. KALRM Palaniappa & 2 Ors [1934] 1 LNS 10 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(dist)***

TR Rumah Lampoh Dana & Ors v. Government of Sarawak [2005] 8 CLJ 705 HC ***(refd)***

Legislation referred to:

Constitution of the State of Sabah, arts. 6(1), (2), 9(1)
Courts of Judicature Act 1964, s. 25
Federal Constitution, arts. 132(1), (3), 160
Financial Procedure Act 1957, s. 6(2)
Government Proceedings Act 1956, s. 33(1), (3), (4)
Constitution of the State of Pahang, arts. 11(1), (4), 41(1)(c), 45(1), (2)
Rules of the High Court 1980, O. 45, O. 46, O. 47, 48, 49, 50, 51, O. 52, O. 53 rr. 1(1), 1A, 3(6), O. 73 r. 12(1)
Specific Relief Act 1950, s. 44(1), (2)(b)

Other source(s) referred to:

MP Jain's Administrative Law of Malaysia and Singapore, 2nd edn, 1980, pp 449, 450, 452

William Wade's Administrative Law, Clarendon Press, Oxford, 7th edn, pp 643 and 644

For the appellant - Dato' Mohamad Shafee Abdullah (Dato' Mat Za'raai Alias (Pahang State Legal Adviser), S Siva & Peter Skelchy with him); M/s Shafee & Co

For the respondent - Karpal Singh (Rajoo D Moorthy, Amardas & Jimmy Ng with him); M/s Peter Lai, Rajoo & Aziz

[Appeal from High Court, Kuantan; Judicial Review No: 25-9-2008]

Reported by Suresh Nathan

A

JUDGMENT

Zaleha Zahari JCA:

[1] I have had the advantage of seeing the judgment of my brothers, Sulaiman Daud, JCA and Jeffrey Tan Kok Wha, JCA on the issues raised in argument in this appeal. With respect, I take a different position on the issue whether the application for judicial review for an order of *mandamus* by Seruan Gemilang Makmur Sdn Bhd, the applicant in the High Court and respondent in this appeal (hereinafter referred to as "the respondent") was in breach of the time frame prescribed in O. 53 r. 3(6) of the Rules of the High Court 1980 ("the Rules"). On the issue whether the respondent was right in citing the Menteri Besar Negeri Pahang Darul Makmur (appellant in this appeal) as the respondent to their application, I would like to give my supporting views.

Background

[2] The undisputed facts disclosed in the statement and affidavits filed in support and in opposition to the application filed by the respondent are these.

[3] On 9 December 2002 the respondent filed Kuantan Civil Suit No. MT(2)-21-9-2002 ("the original suit") citing the State Government of Pahang as 1st defendant and the Director of the Forestry Department, Pahang as 2nd defendant ("the defendants") for breach of contract. At the end of trial on 25 May 2007, the High Court entered judgment in favour of the plaintiff (ie, the respondent in this appeal) in the sum of RM37,127,471.60 with interest at the rate of 8% p.a. from 31 December 2000 ("the said judgment") to date of settlement. The defendants filed an appeal on 1 June 2007 against the said judgment to the Court of Appeal.

[4] *Vide* their solicitors letter dated 27 August 2007, the respondent served a sealed copy of the said judgment on the Pahang State Legal Adviser (counsel for the defendants in the original suit) demanding payment of the judgment sum together with interest within seven days and proposed that costs be fixed at RM200,000 *in lieu* of taxation. The defendants failed to pay the judgment sum within the period specified in this letter.

B C D E F G H I

[5] Pending disposal of the defendants' appeal against the said judgment in the Court of Appeal, the respondent *vide* summons-in-chambers dated 24 September 2007 in the original suit applied for a Certificate under s. 33 of the Government Proceedings Act 1956 ("the Act"). The Senior Assistant Registrar (SAR) granted an order-in-terms of this application on 7 March 2008. The material part of this order states as follows:

> **Adalah Pada Hari Ini Diperintahkan** bahawa suatu Sijil dikeluarkan kepada Plaintif dalam tindakan ini menurut Seksyen 33 Akta Prosiding Kerajaan 1956 bagi pembayaran amaun penghakiman berjumlah RM37,127,471.60 dengan faedah ke atasnya pada kadar 8% setahun mulai 31.12.2000 hingga penjelasan menurut penghakiman yang diberikan oleh Mahkamah yang mulia ini dalam tindakan ini pada 25hb Mei 2007 terhadap Defendan Pertama, Kerajaan Negeri Pahang Darul Makmur dan Defendan Kedua, Pengarah Negeri Pahang Darul.

[6] The s. 33 Certificate states as follows:

> Dalam Mahkamah Tinggi Malaya Di Kuantan
> Dalam Negeri Pahang Darul Makmur
> Guaman No. MT(1)21-9 Tahun 2002
>
> Antara
>
> Seruan Gemilang Makmur Sdn. Bhd ... Plaintif
>
> Dan
>
> 1. Kerajaan Negeri Pahang Darul Makmur
> 2. Pengarah Perhutanan Negeri Pahang Darul Makmur ... Defendan-defendan
>
> **Perakuan Perintah Untuk Amaun Penghakiman Terhadap Kerajaan**
>
> Mengikut Penghakiman Mahkamah ini bertarikh 25hb Mei 2007 telah dihakimkan bahawa Defendan-Defendan hendaklah membayar kepada Plaintif RM137,127,471.60 dengan faedah ke atasnya pada kadar 8% setahun mulai 31hb Disember 2000 hingga penjelasan.
>
> Saya dengan ini memperakukan bahawa amaun penghakiman yang kena dibayar kepada Plaintif menurut Penghakiman tersebut ialah RM37,127,471.60 dan faedah adalah kena dibayar atasnya pada kadar 8% setahun dari 31hb Disember 2000 sehingga pembayaran.

A Bertarikh pada 7hb Mac 2008

t.t.

Noor Aisah binti Mohmed
Penolong Kanan Pendaftar,
B Mahkamah Tinggi

[7] This s. 33 Certificate issued pursuant to order dated 7 March 2008 is the foundation of the respondent's application for judicial review for an order of *mandamus*, the subject matter of this C appeal.

[8] The Court of Appeal struck out the defendants' appeal against the said judgment on 13 February 2008 for failure to file their record of appeal within time. An application for leave to appeal to the Federal Court was then filed by the defendants against this D decision of the Court of Appeal.

[9] About three weeks after the Court of Appeal decision, ie, on 7 April 2008, the respondent's solicitors served on the Pahang State Legal Adviser a copy of the SAR's order dated 7 March 2008 as well E as the s. 33 Certificate. The defendants again did not make any payment of the judgment sum. They also did not take any step to obtain an order for stay of the said judgment. The situation remained at *status quo* for another period of about five months.

F **[10]** On 17 September 2008, the Federal Court dismissed the defendants' application for leave to appeal to the Federal Court against the Court of Appeal decision dated 13 February 2008.

[11] On 15 October 2008, (ie, slightly over a month after the Federal Court decision) the respondent filed an application for G judicial review for an order of *mandamus* to enforce the said judgment, not against the defendants in the original suit and named in the s. 33 Certificate, but against the appellant in this appeal.

[12] The High Court on 3 November 2008 entertained an oral H application to amend the application filed to one for leave to apply for an order of *mandamus* and granted an order-in-terms of the orally amended application. On the substantive application filed on 8 November 2008, the High Court granted an order-in-terms of the application on 20 April 2009. The appellant was directed to pay the

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respondent the sum certified under the s. 33 Certificate within 14 days of the said order. This order of the High Court has since been stayed pending disposal of this appeal.

[13] In presenting the appellant's case, Dato' Shafee Abdullah, at the outset of hearing, highlighted the fact that the defendants in the original suit had, on 22 December 2008, filed a new suit, ie, Kuantan High Court Civil Suit No. 21-11-2008 ("the New Suit") against the plaintiff in the original suit (ie, the respondent in this appeal) for the following reliefs: (a) that the judgment of the High Court in the original suit dated 25 May 2007 be set aside and/or rescinded; a declaratory order that the plaintiff's claim in the original suit be dismissed. Alternatively, for an order that a fresh trial be commenced in respect of the original suit. Further, that all proceedings undertaken by the plaintiff in the original suit to enforce order dated 25 May 2007 (the order which the respondent was seeking to enforce and the subject matter of this appeal) be declared a nullity. There was also a claim for damages, aggravated and/or exemplary, as well as for consequential orders. The New Suit is pending before the High Court on the date of hearing of this appeal.

[14] My views on this development are these. True, it is open for a party to file a fresh suit if a judgment or order has been obtained by fraud, or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, (See *Cheah Wong Nyan and Cheah Sin Kee v. KALRM Palaniappa & 2 Ors* [1934] 1 LNS 10); *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92 Federal Court). Be that as it may cognizance must necessarily be given to the fact that on the date of hearing of this appeal, the respondent had in hand a judgment obtained after a full trial, that had been subjected to an appeal, which appeal was struck out by the Court of Appeal. Thereafter, leave to appeal was refused by the Federal Court. In such a situation, the said judgment for all intents and purposes, is a valid judgment. In the absence of an order for stay, the respondent was clearly entitled to enforce the said judgment which had been entered in their favour. The fact of the filing of the New Suit *per se*, in my considered opinion, does not preclude this court from proceeding to hear this appeal on its merits.

[15] On the issues raised on the merits of this appeal my views are these. It is abundantly clear that the respondent has an unsatisfied judgment against the defendants in the original suit. To pursue the said judgment to satisfaction it was incumbent upon the respondent to comply with O. 53 r. 3(6) of the Rules which provides as follows:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the respondent provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[16] The High Court in its judgment was of the view that the 40 days specified under O. 53 r. 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. I am in agreement with the appellant's counsel that compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction (See *Mersing Omnibus Co. Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266).

[17] The question for determination in this appeal is, against what date is the very ordinary word "promptly" to be considered on the facts of this case? What is the commencement date when the forty days prescribed by the rules is to be computed?

[18] The appellant's counsel submitted that the respondent had not acted "promptly", that there was delay in filing the application for judicial review as it was not filed within forty days as prescribed by the Rules. The appellant's counsel computed time from 7 April 2008, ie, the date of service of the s. 33 Certificate on the Pahang State Legal Adviser. The last day for filing of the application was, according to him, 17 May 2008. As the application for judicial review was filed on 15 October 2008, it was therefore about five months out of time. The fact that the respondent did not apply for an extension of time for leave to apply, and the failure to give an explanation for delay was highlighted. He pointed out that in *Mersing Omnibus*, where the appellant was out of time and had not sought an extension of time nor accounted for the delay, the Federal Court held that leave should not have been granted.

[19] On the other hand the respondent's counsel argued that they were not in breach of O. 53 r. 3(6). The respondent had acted "promptly" by reason of the application having been filed within forty days of the Federal Court's refusal to grant the defendants' leave to appeal (17 September 2008). He further submitted there was a continuing breach by reason of the continued failure to pay the judgment sum.

[20] My brother, Jeffrey Tan JCA, in his draft judgment, took the view that the respondent's application was filed out of time, which view my brother, Sulaiman Daud JCA has expressed his agreement. With respect, I take a different position for the following reasons.

[21] The word "and", between the word "promptly" and the words "in any event within 40 days" in its plain and ordinary meaning clearly is not disjunctive but conjunctive. An aggrieved person is required to act "promptly", and in any event, not later than forty days from "the date when the grounds for the application first arose" or "when the decision is first communicated to the respondent". The rule envisages an easily ascertainable date. It imposes an obligation on the decision maker to make a decision, and to then communicate the decision. This is an integral part of the decision making process. That date when ascertained, and upon expiration of the prescribed time frame, such a decision then becomes "final" and immune to challenge. The intention of the rules clearly is that it is in the public interest that an aggrieved person's right of access to the court has to yield to the need for a swift finality of decision.

[22] What then is the date when time starts to run for the purpose of ascertaining whether the respondent had acted "promptly" and within forty days on the facts of this case? The date suggested by the appellant's counsel is the date of service of the SAR's order and the s. 33 Certificate on the Pahang State Legal Adviser, counsel for the defendants (7 April 2008). Is this date "the date when the grounds for the application first arose"? Alternatively, is this the date "when the decision is first communicated to the respondent".

[23] I am of the view that the suggested date "7 April 2008", certainly is not "the date when the grounds for the application first arose" for these reasons. The respondent has chosen to name the appellant as the respondent to the application for judicial review. It

A is unclear from the record whether, and when, the s. 33 Certificate matter was referred to the appellant for a "decision" and the decision made, to constitute "the date when the grounds for the application first arose". Logically, the date of the decision would be a date subsequent to the date of service of the s. 33 Certificate on
B the State Legal Adviser. This would have a bearing on the next issue which would be considered later on in this judgment.

[24] Next, on the assumption that the s. 33 Certificate was referred to the appellant for a decision, and the appellant's decision
C was not to comply with the s. 33 Certificate, the rules require him to communicate that decision, and when communicated, that would then be the date "when the decision is first communicated to the respondent". What transpired after service of the court order dated 7 April 2008 and the s. 33 Certificate on the Pahang State Legal
D Adviser and the appellant is not within the knowledge of the respondent, but within the knowledge of the appellant. Whether this non-disclosure was deliberate or inadvertently omitted, is unclear. In the absence of a date implicating the appellant being held out, I am constrained to search for a more just result. I take the position
E when conferring a right of access to the courts, if indeed the matter was referred to the appellant and a decision had in fact been made by him, that right cannot be lost before the respondent is notified of that decision and having the opportunity of feeling "aggrieved".

F **[25]** On the facts of this case it is clear that the respondent only commenced enforcement proceedings by way of an application for judicial review after all appeals against the said judgment had been disposed of. The judicial review application for *mandamus* resorted to by the respondent was to overcome the problem when confronted
G with the recalcitrance of the defendants in the original suit to pay the said judgment. Clearly, in the present circumstances the fact that the respondent took such an action after all appeals had been disposed of should not be held against them. I am in agreement with the respondent's counsel that the filing of the application for
H judicial review for an order of *mandamus* within forty days of the Federal Court decision (17 September 2008) that the respondent had acted "promptly" and in compliance with O. 53 r. 3(6) of the Rules.

I

Whether The Appellant A Proper Party To The Application?

[26] I accept the proposition that a s. 33 Certificate imposed a statutory obligation on a State Government to do their duty to make payment. The Federal Court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321 expressed the following view:

> … there is a duty on the part of Government to pay the amount stated in the certificate issued under section 33(3) of the GPA to the respondent. It is not a matter of discretion for the Government whether to pay or not to pay. As a statutory duty it is of course binding on the State Government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*.

[27] It is however incumbent upon the respondent to cite the proper party in pursuit of their judgment to satisfaction. The respondent's decision to cite the appellant, and not the State Financial Officer of Pahang, as respondent to the application appears to be a considered one by reason of the State Financial Officer being a member of one the "public services" and on account of their reading of the Federal Court decision in Petrojasa. The respondent took the position that the appellant was the right person to be named as he is the Chief Executive of the State of Pahang, in charge of the finance portfolio of the State of Pahang and the competent authority to make payment from the State Consolidated Fund. Accordingly, the responsibility to make payment of the said judgment was under the appellant's supervision.

[28] The appellant's counsel submitted that the appellant had been wrongly cited as party to the application as he is not the officer responsible for the financial affairs of the State of Pahang. The appellant's reading of the Federal Court decision in Petrojasa was that there was no impediment for a State Financial Officer of a State to be named as a respondent to a judicial review proceeding for enforcement of a judgment against the State.

[29] Article 11 and 41 of the Pahang State Constitution states as follows:

A 11. Appointment of the State Secretary, the State Legal Adviser and the State Financial Officer.

(1) There shall be constituted the offices of State Secretary, State Legal Adviser and State Financial Officer, and the appointments thereto shall be made by the appropriate Service Commission from
B amongst members of any of the relevant public services. …

…

…

C …

(4) The State Financial Officer shall, subject to the provisions of this Part, be the principal officer in charge of the financial affairs of the State.

D 41. Expenditure charged on Consolidated Fund.

(1) There shall be charged on the Consolidated Fund of the State, in addition to any grant, remuneration or other moneys so charged by any other provision of the Constitution of the State or by State law
E

(a) the Civil List of the Ruler and the remuneration of the Speaker of the Legislative Assembly;

(b) all debt charges for which the State is liable; an any moneys required to satisfy any judgment, decision or award against the
F State by any court or tribunal.

[30] I am in agreement with the appellant's counsel that under the Pahang State Constitution the responsibility for the financial affairs of the State of Pahang is conferred on the State Financial Officer
G and the respondent's reliance on *Petrojasa* as authority for the proposition that the State Financial Officer cannot be cited as a party to enforce a judgment against a State Government was misplaced. There is no such legal impediment. It is to be noted that in Petrojasa the "Minister of Finance, Government of Sabah",
H not the "Chief Minister, Government of Sabah" was cited as party based on art. 6(1) and (2) and 9(1) of the Constitution of the State of Sabah.

[31] The learned judge should have dismissed the application as
I the proper party had not been cited in the judicial review application. On this ground, I am in agreement with the conclusion of my brothers to allow this appeal with costs.

Sulaiman Daud JCA:

[32] There were two issues raised in this appeal which have been elaborately argued before us. The first concerns the time when the 40 days limitation set out in O. 53 r. 3(6) of the Rules of the High Court 1980 ("the RHC") begins to run in the present case. The second is whether the order of *mandamus* would lie against the appellant to enforce the payment of the judgment sum against the State Government of Pahang by virtue of a certificate issued under s. 33(1) ("the s. 33 certificate") of the Government Proceedings Act 1956 ("the GPA"). The learned trial judge found for the respondent on both the said issues. It was held that the present application was not barred by the said 40 days limitation, and that the order of *mandamus* would lie against the appellant to enforce the payment of the judgment sum.

[33] We heard the appeal on 5 October 2009 and after hearing submissions of counsel for both parties, we unanimously allowed the appeal with costs. I have had the advantage of reading in draft the judgment of my learned friend Jeffrey Tan JCA. I generally agree with his reasons and conclusion and wish to add some observations with regard to second issue.

[34] From the grounds of judgment, it appears to me that the learned trial judge had allowed respondent's application herein on three main grounds. First, he held that the order of *mandamus* could not be issued against the State Financial Officer, being the principal officer in charge of financial affairs of the State, by reason of the restriction imposed under s. 44(2)(b) of the Specific Relief Act 1950 ("the SRA"). Secondly, he found that the order of *mandamus* could be issued against the appellant by virtue of his position as the chairman of the State Executive Council and the holder of the finance portfolio of the State. Thirdly, he also found that the respondent has the power and competence to order the payment of the judgment sum out of the Consolidated Fund of the State ("the Consolidated Fund") by virtue of art. 41(1) of the Laws of the Constitution of Pahang ("the State Constitution").

[35] Learned counsel for the appellant submitted that the order of *mandamus* should not be issued against the appellant to comply with the s. 33 certificate in respect of the judgment sum payable by the State Government to the respondent. It was contended that the appellant was not the proper party to be issued with such an order

as he was not the person responsible for the financial affairs of the State. He pointed out it is expressly provided under the State Constitution that the State Financial Officer is the principal officer in charge of financial affairs of the State. Further, learned counsel submitted that s. 44(2)(b) of the SRA does not expressly prohibit the making of an order against a government servant to enforce the satisfaction of a claim upon the Government, and that the court is still empowered to make such an order by virtue of the additional power conferred by para 1 of the Schedule to the Court of Judicature Act 1964. In support of this proposition, learned counsel relied on the decision of the Federal Court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321, where it was held that an order of *mandamus* would lie against the Minister in charge of financial matters of the State of Sabah for the payment of the judgment sum under the s. 33 certificate.

[36] Learned counsel for the respondent supported the decision of the learned trial judge. He submitted that the appellant is obliged to pay the state's debt by virtue of his position as the head of administration of the State who also holds the portfolio of finance. Learned counsel further submitted that the State Financial Officer is a member of the public service, and by virtue of the prohibition imposed under s. 44(2)(b) of the SRA no order can be made against him to enforce the satisfaction of the said judgment sum.

[37] In *William Wade's Administrative Law*, Clarendon Press, Oxford, 7th edn, the learned author said, at pp. 643 and 644:

> The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds ... The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty to him.

Further down at p. 644, it is stated:

> Disobedience to *mandamus* is a contempt of court, punishable by fine or imprisonment. A *mandamus* is therefore very like a mandatory injunction: both are commands from the court that some legal duty be performed. But the two remedies have different spheres. The injunction is an equitable remedy, and it is rare to find mandatory injunctions outside private law. *Mandamus* is a common law remedy, based on royal authority, which is used only in public law.

[38] In *M.P. Jain's Administrative Law of Malaysia and Singapore*, 2nd edn, 1980, the learned author said, at pp. 449 and 450: A

> … *Mandamus* can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law, and to keep the subordinate bodies and officers exercising public functions within the limit of their jurisdiction. *Mandamus* is thus a very wide remedy which is available against a public officer to see that he does his duty. B
>
> What can be enforced through *mandamus* is a duty of a public nature the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has a power rather than a duty, and he does not use his power, *mandamus* cannot be issued. C

[39] Section 44(1) of the SRA also empowers the court to make an order in the nature of *mandamus* against any person holding public office requiring him to do certain specific acts subject to the fulfilment of the five provisos set out therein (see *M.P. Jain's Administrative Law of Malaysia and Singapore, supra* at p 452). However it expressly provided in subsection (2)(b) thereof that nothing in that section "shall be deemed to authorize a judge to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government". D E F

[40] It is clear from the aforesaid passages that the order of *mandamus* could be issued to enforce the performance of a public duty where there has been a failure to perform the same. However it cannot be used as a remedy to compel the exercise of a power by any person or authority. In the present case, the question as to whether there is a duty on the part of the appellant to pay the judgment sum pursuant to the s. 33 certificate could, in my view, be answered by reference to the provisions of the State Constitution and the laws relating to financial matters for the time being force in the State. G H

[41] Under the State Constitution the executive power of the State is vested in the Ruler but executive functions may by law be conferred on other persons or authorities. The Ruler shall appoint an Executive Council to advice Him in the exercise of His I

functions under the Constitution. The Executive Council comprises the Menteri Besar and such other members not exceeding ten as may be appointed by the Ruler.

[42] In addition, the State Constitution also provides for the appointment of the State Secretary, the State Legal Adviser and the State Financial Officer from amongst members of the relevant public services as the *ex-officio* members of the Executive Council. Article 11(1) of the State Constitution specifically provides that the State Financial Officer to be the principal officer in charge of financial affairs of the State.

[43] Chapter V of the State Constitution deals with financial matters. Article 41(1)(c) specifically provides that any moneys required to satisfy any judgment shall be charged to the Consolidated Fund. Article 45(1) permits moneys charged on the Consolidated Fund to be withdrawn from the Fund, while art. 45(2) prohibits the withdrawal of such moneys except in the manner provided by federal law.

[44] The control and management of the public finance of Malaysia, including the custody and payment of the public moneys of the State is governed by the Financial Procedure Act 1957 ("the FPA"). Section 6(2) of the FPA provides that the management of the Consolidated Fund of a State and the supervision, control and direction of all matters relating to the financial affairs of the State not specifically assigned to any other person shall, subject to the Federal Constitution, the Constitution of the State and the Act, vest in the State financial authority. In relation to the Consolidated Fund of the State, the words "financial authority" is defined as the principle officer in charge of the financial affairs of the State which in the present case is the State Financial Officer.

[45] It is not disputed that the appellant is the Chairman of the Executive Council, being the body responsible to advice the Ruler in the exercise of His executive power of the State. It is also not disputed that the real decision- making power of the State rests with the Executive Council which is headed by the appellant. In his capacity as the Menteri Besar he may have some duty or function to perform either in the capacity of his office or as a member of the Executive Council. At the same time there are other government officers under various government departments which also perform specific acts of the government whether administratively or as required by law.

[46] In the present case the effect of the order against the appellant is to compel him to make the payment of the judgment sum pursuant to the s. 33 certificate. It is clear from the passages referred to above that the order of *mandamus* is to compel the performance of a duty and not the exercise of a power. As such the question here is not whether the appellant has the power to make or order the making of such payment but rather whether he has a duty or obligation to make such payment. Upon perusal of the provisions of the State Constitution and the FPA, I find nothing therein that imposes such a duty or an obligation upon the appellant. The duty to make payment in satisfaction of a judgment debt against the State relates to financial affairs of the State which lies in the hands of the State Financial Officer. As such, I am of the view that the learned trial judge has erred in law in granting the order of *mandamus* against the appellant to compel him to pay the said judgment sum pursuant to the s. 33 certificate.

[47] However, I find it unnecessary to consider the issue as to whether or not s. 44(2)(b) of the SRA prohibits the issuance of *mandamus* against the State Financial Officer as raised by learned counsel in the course of their submission as it is not relevant for the determination of this appeal.

[48] For all the reasons aforesaid, I would allow the appeal with costs.

Jeffrey Tan JCA:

[49] For the purposes of this appeal, it is not inapposite to say that for all intents and purposes, the respondent has a valid monetary judgment (the receipt of RM37,127,471.60 together with interest thereon at the rate of 8% per annum from 31 December 2000 to date of satisfaction) against the State Government of Pahang and the Director of the Forestry Department of Pahang (hereinafter jointly called the defendants), notwithstanding the fact that the defendant have filed a concurrent but as yet unconcluded action to set aside the judgment. That monetary judgment was obtained by the respondent on 25 May 2007 *vide* Kuantan High Court Civil Suit 21-9-2002 after a full trial. Appeal against that judgment was struck off by the Court of Appeal on 13 February 2008. The application for leave to further appeal was dismissed by the Federal Court on 17 September 2008.

[50] But even before all avenues of appeal had closed, the respondent had proceeded to levy execution of the judgment. On 7 March 2008, the respondent had obtained a certificate under s. 33(1) of the Government Proceedings Act 1956 (GPA), and on 7 April 2008, the respondent had served that s. 33(1) certificate on the State Legal Advisor of Pahang. The next action that the respondent took to compel payment of the judgment sum was to issue a letter of demand on 27 August 2008, which drew no response from the defendants. The respondent then applied, on 15 October 2008, for leave to issue an order of *mandamus* directing payment of the judgment sum by the appellant, not by the defendants. That leave was granted on 3 November 2008. The order of *mandamus* that followed was issued on 20 April 2009, which order is now the subject of this appeal.

[51] Only two issues were raised in submission before us, which were, now abridged, the following. Dato' Muhammad Shafee Abdullah for the appellant contended that the application for the order of *mandamus* must be made within 40 days from the date of service of the s. 33(1) certificate, that the application for the order of mandamus was made out of time, and that the order of *mandamus* was issued to the wrong entity. Mr. Karpal Singh for the respondent submitted that the said 40 days time period did not apply, that under s. 44 of the Specific Relief Act 1950 ('SRA') the State Financial Officer could not be sued, and that the appellant was the head of the state government. Mr. Amardass who appeared with Mr. Karpal added that the appellant was in charge of the finance of the state. Dato' Muhammad Abdullah Shafee replied that the respondent could proceed against the State Financial Officer, who was the pertinent public officer.

[52] No issue was raised that an order of *mandamus per se* could not issue against the appellant. But whether *mandamus* could issue against servants and or agents of the State was the sole issue in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321, where the respondent had obtained a monetary judgment against the State Government of Sabah and had taken out judicial review proceedings against the Minister of Finance, Government of Sabah to compel payment of the judgment sum as certified in a similar s. 33(1) certificate. That s. 33(1) certificate was served on the State Government of Sabah. The required payment was not made. Leave was then granted to the respondent to apply for an

order of *mandamus*. But the substantive application for the order of *mandamus* was dismissed by the High Court who held that the application under s. 33(3) of the GPA was prohibited by s. 33(4) of the GPA. On appeal, the Court of Appeal was of the view that s. 33(4) of the GPA, s. 44(1) of the Specific Relief Act 1950 (SRA) and O. 73 r. 12 of the Rules of the High Court 1980 (RHC) were no impediments to the application. On further appeal, the sole issue before the Federal Court was whether judicial proceedings could be taken against the said Minister to compel payment of the judgment sum as certified in the said s. 33(1) certificate.

[53] The facts in *Petrojasa* bear comparison to the facts of the instant appeal, but the rulings in *Petrojasa* bear upon the instant appeal, for those rulings from the apex court apply to all proceedings to compel compliance of any order (including an order for costs) made by any court in favour of any person against the Government or against an officer of the Government. In answering the question as to whether *mandamus* lie, the Federal Court per Abdul Hamid Mohamad CJ held (i) that as against a government, there can be no resort to any of the procedures provided by O. 45 to O. 52 of the RHC (para 11 of the report) (ii) that as against a government, the only procedure allowed is as provided by s. 33 of the GPA (para 11 of the report), (iii) that under s. 44 of the SRA, a judge "may make an order requiring any specific act to be done 'by any person holding a public office'" but not "to make an order on any servant of any Government in Malaysia" or "to make any order which is otherwise expressly excluded by any law for the time being in force" (para 13 of the report) 649), (iv) that the Government of Malaysia is not a person holding a public office (para 16 of the report), (v) that a "public office" and "public officer" are defined in the Interpretation Acts 1948 and 1967 and read together with art. 132(1) of the Federal Constitution (paras 20-21 of the report) (vi) that the said Minister was a member of the administration as defined in art. 160 of the Federal Constitution and was not a person holding public office (paras 23-24 of the report), (vii) that s. 44 of the SRA was not applicable to the said Minister and an order therefore under s. 44 of the SRA could not be issued against him (para 24 of the report), (viii) that under s. 25 of the Courts of Judicature Act 1964 (CJA), the court has the additional powers set out in the schedule to the CJA, and which

powers "are not subject to or limited to what are provided by the GPA or SRA" (paras 30 of the report), and, (ix) that *mandamus* laid against the said Minister (paras 31 and 37 of the report).

[54] Ariffin Zakaria FCJ, as he then was, similarly held (i) that by reason of O. 73 r. 12(1) of the RHC, the ordinary method of execution as contained in O. 45 to 52 of the RHC lie not against a government (paras 54 and 59 of the report), (ii) that s. 25 of the CJA are additional powers to that already seised by a court (para 67 of the report), and, (iii) that "resort may … be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law" (para 67 of the report).

[55] And in relation to the legal effect of the said s. 33(1) certificate, Ariffin Zakaria FCJ further enunciated (iv) that "the GPA is not to enable the state government to flout the law but to provide a special procedure in order to avoid the embarrassment of execution proceedings against the state government" (para 71 of the report), (v) that the word 'shall' in the context of s. 33(3) of the GPA "connotes an obligation to pay" (para 71 of the report), (vi) that s. 33(3) provided that 'pending an appeal or otherwise' the government may apply for a stay or suspension of the payment" (para 71 of the report), (vii) that once a certificate was issued under s. 33(1) of the GPA and duly served on the state government, it was obligatory on the state government to make the necessary payment (para 72 of the report), (viii) that pursuant to s. 33(3) of the GPA the state government was under a statutory duty to pay the judgment sum as stated in the said certificate (para 81 of the report), (ix) that the said Minister who was in charge of financial matters for the state was responsible for the payment of the judgment sum (para 82 of the report), and, (x) that in the circumstances of the case an order of *mandamus* could be issued to the said Minister to enforce compliance by the said Minister (para 82 of the report).

[56] At para. 92 of the judgment which had the full support of Abdul Hamid Mohamad CJ, Arifin Zakaria FCJ summed up the general position as follows:

> From the above, the position in law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s. 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state

government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*.

[57] Hence, the respondent could not levy execution of the judgment by way of the procedure contained in the RHC. The only procedure open to the respondent was that provided in s. 33 of the GPA. Under s. 44 of the SRA, the court below was seised to "make an order requiring any specific act to be done 'by any person holding a public office'". Amongst the orders that the court below could make was the order of *mandamus*. All except that the court below could only make such an order against "a person holding a public office". A person holding public office is a public officer lawfully holding, acting or exercising the functions of a public office in any of the public services as defined in art. 132(1). However, as Chief Minister of the State, the appellant was a member of the administration as defined in art. 160 of the Federal Constitution. The appellant was not "a person holding a public office" within the meaning of "public office" as defined in the Interpretation Acts 1948 and 1967 and read together with art. 132(1) of the Federal Constitution, that is definitely so as art. 132(3) expressly provides that "the public services shall not be taken to comprise the office of any member of the administration in the Federation or a State". An order of *mandamus* could not be issued against the appellant under s. 44 of the SRA. There were yet the additional powers under s. 25 of the CJA. But in the instant case, the order of *mandamus* was issued, even though within powers, to the wrong entity. Under art. 11(4) of the Constitution of the State of Pahang, "the State Financial Officer shall, subject to the provisions of this Part, be the principal officer in charge of the financial affairs of the State. Unlike the said Minister in *Petrojasa* who was in charge of financial matters for the state and who was responsible for the payment of the judgment sum (see *Petrojasa supra* at para 82), the appellant was not the principal officer in charge of the financial affairs of the State of Pahang. The appellant was not responsible for the payment of the judgment sum.

[58] To compound the error, the respondent had not complied with O. 53 r. 3(6) of the RHC, which reads as follows:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[59] "… an application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose". Prior to its amendment in 2000 (see PU(A) 342/2000), the former O. 53 provided that "no application for an order for *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule" (former O. 53 r. 1(1)), and that "leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, conviction, or other proceedings for the purpose of it being quashed, unless the application for leave is made within six weeks after the date of the proceeding or such other period (if any) as may be prescribed by any enactment, or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the court or judge, to whom the application for leave is made and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired" (former O. 53 r. 1A). Under the former O. 53, there was a prescribed time for an application to be made for leave to apply for an order of *certiorari* (see *Mersing Omnibus v. The Minister of Labour and Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 where it was held by the former Federal Court per Abdoolcader FJ that the terms of O. 53 rr. 1 and 1A clearly reflected the imperative requirements which must be complied with before an application for *certiorari* can be made). But the former O. 53 r. 1A only applied to an application for an order of *certiorari*. Under the former O. 53, it was not so provided that leave shall not be granted unless the application for leave to apply for an order of *mandamus* or prohibition was made within a prescribed time upon a certain date or event. But that dichotomy, different rules for different prerogative writs, if any (see *Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors* [1999] 8 CLJ 37, where it was held by Abdul Hamid Mohamed J, as he then was, that the reliefs sought, namely prohibition and *mandamus*, required leave to

be obtained within six weeks from the date of the decision of the appeal board), has been done away with. Now, all applications for judicial review must be made "promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days."

[60] It is imperative that an application for judicial review is made within time (*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473). Three recent authorities illustrate how those prescribed 40 days had been calculated. In *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698, it was held that the material date from which the 40 days was to be calculated was the date when Bursa resisted attempts by GBA to preclude the Listing Committee from partaking in deliberations. In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805, it was held that the application had to be made within 40 days from when the decision was communicated to the applicant. And in *TR Rumah Lampoh Dana & Ors v. Government of Sarawak* [2005] 8 CLJ 705, it was in effect held that any application for judicial review had to be made within 40 days from the date of gazette of the Direction.

[61] In the instant case, there was no dispute that the s. 33(1) certificate was served on the State Legal Advisor of Pahang on 7 April 2008, that the letter of demand was dated/issued on 27 August 2008, and, that "the application for judicial review was made on 15 October 2008. Since there was an application for judicial review, there ought to have been grounds for the application. The stated grounds in the affidavit (see 70AR) filed in support of the said application, the relevant paragraphs, were as follows:

> 3. Pada 25.05.2007 Plaintif telah memperolehi penghakiman terhadap Kerajaan Negeri Pahang Darul Makmur dan Pengarah Perhutanan Negeri Pahang Darul Makmur dalam tindakan No. 21-9-2002 di Mahkamah yang Mulia ini. (Selepas ini dirujuk sebagai "tindakan tersebut").
>
> 4. Melalui surat bertarikh 27.08.2007 peguamcara Plaintif telah menghantar sesalinan penghakiman tersebut kepada peguamcara Defendan-Defendan dalam tindakan tersebut dan meminta pembayaran amaun penghakiman dan faedah tetapi Defendan-

A Defendan tidak membuat sebarang bayaran. Salinan surat bertarikh 27.08.2007 dan Penghakiman bertarikh 25.05.2007 dikemukakan sekarang sebagai eksibit "LS1".

5. Pada 07.03.2008 permohonan Plaintif untuk suatu Perakuan di bawah seksyen 33 Akta Prosiding Kerajaan 1956 telah dikeluarkan
B tanpa bantahan peguamcara Defendan-Defendan dalam tindakan tersebut. Salinan Perintah bertarikh 07.03.2008 dan salinan Perakuan Perintah untuk Amaun Penghakiman Terhadap Kerajaan juga bertarikh 07.03.2008 dikemukakan sebagai eksibit "LS2".

C 6. Perintah dan Perakuan bertarikh 07.03.2008 telah diserahkan kepada peguamcara Defendan-Defendan dalam tindakan tersebut melalui surat bertarikh 07.04.2008 yang juga menuntut bayaran, tetapi Defendan-Defendan tersebut masih juga tidak membuat sebarang bayaran. Salinan surat bertarikh 07.04.2008 dikemukakan sebagai eksibit "LS3".

D 7. Setakat ini di dalam tindakan tersebut tidak dapat apa-apa perintah yang menggantung atau menghalang pelaksanaan penghakiman dalam tindakan tersebut.

8. Juga Perakuan yang terdapat di eksibit "LS2" tidak
E menggantungkan pelaksanaan pembayaran amaun yang diperakui mengikut proviso kepada seksyen 33(3) Akta Prosiding Kerajaan 1956.

9. Saya dinasihatkan bahawa Perakuan yang dikeluarkan tanpa arahan penggantungan tersebut bererti Defendan-Defendan dalam
F tindakan tersebut semestinya membuat bayaran.

10. Menurut seksyen 33(3) Akta Prosiding Kerajaan 1956 adalah wajib bagi Kerajaan Negeri Pahang Darul Makmur, iaitu Defendan Pertama dalam tindakan tersebut, membuat bayaran amaun yang dinyatakan dalam Perakuan tersebut setelah Perakuan itu diserahkan.
G

11. Saya dinasihatkan dan percaya bahawa Responden yang dinamakan di atas selaku Menteri Besar Negeri Pahang Darul Makmur bertanggungjawab untuk membuat bayaran kepada Plaintif bagi pihak Kerajaan Negeri Pahang Darul Makmur iaitu Defendan
H Pertama dalam tindakan tersebut.

[62] The stated ground for the application for judicial review was failure on the part of the defendants to comply with the said s. 33 certificate. If it were in any way pertinent, in so far as the
I respondent were concerned, the State Government of Pahang had to pay the judgment sum upon service of the s. 33 certificate, without

any question of deferment (see 71-72AR). Indeed, that was the undoubted case, for the duty to pay the judgment sum arose there and then, upon service of the s. 33 certificate. Section 33(3) of the GPA was absolutely clear-cut that the respondent shall be paid the amount appearing by the certificate together with the interest, unless there was a direction that payment be suspended:

> If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:
>
> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

[63] Given that there was no direction that payment was suspended, the duty to pay arose upon service of the s. 33 certificate, literally upon presentation thereof. On the facts, the grounds for the application first arose on 7 April 2008, when service of the s. 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a patent failure to comply with rules of court, and the order of *mandamus* should have been there and then refused.

[64] For those reasons, I would allow the appeal which was argued on 5 October 2009.

[65] Approved for release this 31 March 2010.